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No. 86-396

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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SUPREME COURT, U.S.

STATE OF ILLINOIS,

Petitioner,

vs.

CLIFFORD ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JAMES J. DOHERTY
Public Defender of Cook County
403 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-6350

Counsel for Respondent.

ROBERT P. ISAACSON*
KAREN A. POPEK
Assistant Public Defenders

Of Counsel.

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court was correct in applying this Court's recent decision in Wainwright v. Greenfield to a case which is factually on all fours with Greenfield.

2. Whether the Illinois Supreme Court properly held that the errors in the admission of respondent's post-Miranda warnings silence on two occasions as substantive evidence of his sanity and thus of his guilt and prosecutorial argument thereon were not harmless.

3. Whether this Court's decision in Wainwright v. Greenfield should be applied retroactively to a case not yet final at the time of the Greenfield decision where Greenfield established no new constitutional principle or rule but simply applied the well-settled principles of Doyle v. Ohio to the facts of that case.

TABLE OF CONTENTS

Questions Presented i

Table Of Contents ii

Table Of Authorities iii

Opinion Below 1

Jurisdiction 1

Statement Of The Case 2

Reasons For Denying The Writ 5

I. SINCE RESPONDENT'S CASE IS ON ALL FOURS WITH WAINWRIGHT V. GREENFIELD, THE ILLINOIS SUPREME COURT'S APPLICATION OF THE HOLDING OF GREENFIELD TO THE FACTS OF THIS CASE WAS CLEARLY CORRECT AND PROVIDES NO REASON FOR THIS COURT TO REVIEW ITS DECISION..... 5

II. THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT ADMISSION OF CLIFFORD ANDERSON'S POST-MIRANDA WARNINGS SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT AND PROSECUTORIAL ARGUMENT THEREON WAS NOT HARMLESS ERROR. INDEED, UNDER ANY HARMLESS ERROR STANDARD, SUCH ERROR WAS NOT HARMLESS..... 8

III. SINCE GREENFIELD WAS SIMPLY AN APPLICATION OF THE WELL-SETTLED PRINCIPLES OF DOYLE V. OHIO, AND SINCE RESPONDENT'S CASE WAS NOT FINAL AT THE TIME OF THE GREENFIELD DECISION, GREENFIELD CLEARLY APPLIED TO RESPONDENT'S CASE AND THERE IS THUS NO REASON FOR THIS COURT TO REVIEW THE DECISION BELOW..... 12

Conclusion 16

TABLE OF AUTHORITIES

Chapman v. California, 386 U.S. 18 (1967)..... 10

Donnelly v. DeChristoforo, 416 U.S. 637 (1974)..... 10

Doyle v. Ohio, 426 U.S. 610 (1976)..... passim

Edwards v. Arizona, 451 U.S. 477 (1981)..... 13,14

Fahy v. Connecticut, 375 U.S. 85 (1963)..... 9

Linkletter v. Walker, 381 U.S. 618 (1975)..... 13

Miranda v. Arizona, 384 U.S. 436 (1966)..... 3,14

People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485 (1986)..... 2,8

People v. Miller, 96 Ill. 2d 385, 450 N.E.2d 322 (1983)..... 10

People v. Stack, 112 Ill. 2d 301, 493 N.E.2d 339 (1986)..... 12,13

Shea v. Louisiana, 470 U.S. 50 (1985)..... 12,13,14

Solem v. Stumes, 465 U.S. 638 (1984)..... 14

Steagald v. United States, 451 U.S. 204 (1981)..... 10

Stovall v. Denno, 388 U.S. 293 (1967)..... 13

United States v. Johnson, 457 U.S. 537 (1982)..... 12,13,15

Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986)..... passim

Ill. Rev. Stat. (1981), ch. 38, §6-2(a)..... 4,10

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OPINION BELOW

The opinion of the Supreme Court of Illinois, reversing the respondent's convictions and remanding the cause for a new trial, was issued on June 20, 1986, and is reported at 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3). However, as discussed in full below, petitioner, who seeks to relitigate this Court's holding in a case decided earlier this year which established no new constitutional principle, and who also asks this Court to review a purely factual question which was thoroughly and properly addressed by the Supreme Court of Illinois, has failed to present any ground warranting a grant of certiorari.

STATEMENT OF THE CASE

The Statement of the Case presented by the petitioner essentially sets forth a fair account of the material facts in this case. (Petition at 5-9) However, there are two substantial omissions from petitioner's Statement of the Case and two factual inaccuracies repeated throughout petitioner's argument which respondent believes must be brought to this Court's attention.

First, petitioner neglected to mention that the October, 1981, trial at which Clifford Anderson was convicted of two counts of murder was not his first trial on those charges. Rather, Mr. Anderson had been tried by a jury once before on those same charges and had presented a defense of insanity at that trial in September and October of 1981. (R. 649-765) After deliberating two days, the jury in that first trial indicated that it was hopelessly deadlocked, and a mistrial was declared. (R. 1122-23) The error which was the basis of the Illinois Supreme Court's reversal of respondent's convictions at his second trial and which petitioner is requesting this Court to review -- namely, the erroneous introduction of evidence of Mr. Anderson's assertion of his constitutional rights in response to Miranda warnings as substantive evidence of his sanity and thus of his guilt -- occurred at both of Mr. Anderson's trials. (R. 766-81, 783-827, 1745-61, 1840-44, 1878-79, 1952)

A second omission by petitioner concerns what constituted the bulk of the Illinois Supreme Court's opinion in this case. In reviewing Clifford Anderson's convictions and remanding the cause for a new trial, the state supreme court noted that it needed to address only two of the 35 issues raised by Mr. Anderson in his appeal. People v. Anderson, 113 Ill. 2d 1, 5 (1986). After holding that Mr. Anderson was denied a fair trial by the admission of his responses to Miranda warnings as evidence of his sanity and by prosecutorial argument thereon (113 Ill. 2d at 5-7), the state supreme court devoted the majority of its opinion to another serious error under Illinois evidentiary rules that occurred at Mr. Anderson's trial: the trial court's refusal to allow the defense psychiatric expert witness to

testify about the contents of others' reports and records, and about statements made to him by Mr. Anderson during his examination of Mr. Anderson, upon which the expert relied in making his diagnosis that Mr. Anderson was legally insane at the time of the shootings. See 113 Ill. 2d at 7-13.

In addition to those two omissions, petitioner's argument repeatedly states two factual inaccuracies. First, petitioner claims time and again that Mr. Anderson's responses to the Miranda warnings were properly obtained in an "absolute model" application of the decision in Miranda v. Arizona, 384 U.S. 436 (1966), and that the "defendant has never contended otherwise." (Petition at 15, 16, 25, 26) To the contrary, however, the third issue in the appellate brief filed by Mr. Anderson in the Illinois Supreme Court argued that the admission as substantive evidence of sanity of Mr. Anderson's responses to the Miranda warnings given to him by Assistant State's Attorney Melber and the prosecutors' argument thereon constituted reversible error under Edwards v. Arizona, 451 U.S. 477 (1981), and Miranda v. Arizona, 384 U.S. 436 (1966), because Melber had reinitiated interrogation after Mr. Anderson had already asserted his right to counsel upon initially being given Miranda warnings three hours earlier, without counsel having been provided to Mr. Anderson in the interim. (Defendant's Brief at 87-93) The Edwards argument was presented by Mr. Anderson to the state supreme court as an alternative, in part, if the court failed to grant relief under the theory upon which Mr. Anderson ultimately prevailed. (Defendant's Brief at 88, footnote) Because of its disposition of that issue and its grant of a new trial to Mr. Anderson, the state supreme court determined that it need not address the Edwards issue, which was concerned with most of the same improperly admitted evidence and prosecutorial argument.

Finally, despite petitioner's frequent references to and suggestions of a "fraudulent" or "fabricated" claim or defense of insanity by respondent (Petition at 12, 14, 15, 16, 21-22), there was utterly no evidence presented and no psychiatric expert testified at respondent's trials that respondent was feigning insanity or malingering or

fabricating a fraudulent defense. Rather, all psychiatric expert witnesses for both the State and the defense agreed that Mr. Anderson was suffering at the time of the shootings from some form or degree of mental illness involving strong paranoid features or tendencies or psychosis; the only disagreement between the State and defense psychiatric experts was whether or not Mr. Anderson's paranoid disorder or disease constituted legal insanity under Illinois' statutory definition. See Ill. Rev. Stat. (1981), ch. 38, sec. 6-2(a). (R. 1656-57, 1664-66, 1681, 1792-95, 1797-1805, 1810-11, 1833-34, 1864)

REASONS FOR DENYING THE WRIT

I.

SINCE RESPONDENT'S CASE IS ON ALL FOURS WITH WAINWRIGHT V. GREENFIELD, THE ILLINOIS SUPREME COURT'S APPLICATION OF THE HOLDING OF GREENFIELD TO THE FACTS OF THIS CASE WAS CLEARLY CORRECT AND PROVIDES NO REASON FOR THIS COURT TO REVIEW ITS DECISION.

Petitioner requests this Court to grant a writ of certiorari to review a case which is factually on all fours with this Court's recent decision in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986). In effect, petitioner simply wants to relitigate a decision by this Court which is only a few months old. Since the only substantive difference between Clifford Anderson's case and Greenfield is that Mr. Anderson's counsel vigorously and consistently objected over the course of Mr. Anderson's two trials to the improper admission into evidence of his responses to Miranda warnings and to the trial court's improper instructions to the jury about that evidence and to the prosecutors' arguments about that improper evidence whereas no objection was made to the initial introduction of the evidence by Greenfield's counsel, Mr. Anderson's issue was even stronger than Greenfield's and there is thus no ground warranting a grant of certiorari in respondent's case.

In Greenfield this Court held that, just as in Doyle v. Ohio, 426 U.S. 610 (1976), it was fundamentally unfair for the prosecution to use the defendants' postarrest, post-Miranda warnings silence to impeach their trial testimony, so too it was fundmentally unfair for the prosecution in Greenfield to use the defendant's postarrest, post-Miranda warnings silence as evidence of his sanity. 474 U.S. at ___, 88 L. Ed. 2d at 630-32. In reaching that conclusion, this Court thoroughly rejected arguments by the prosecution that Doyle did not control that case because proof of sanity is significantly different from proof of guilt -- that is, the commission of the underlying offense --, because comprehension of Miranda warnings is probative of sanity, and because the State has a vital interest in being able to present evidence of a defendant's sanity at the time of the offense in

order to sustain its burden of proof in regard to an insanity defense. 474 U.S. at ___, 88 L. Ed. 2d at 630-32. Those totally rejected arguments are the same ones which petitioner in the instant cause now reasserts on the same rejected grounds. (Petition at 11-16) Since petitioner has given this Court no reason to reconsider those arguments, they provide no basis for a grant of certiorari.

The only distinction between the instant case and Greenfield which is suggested by petitioner is that evidence of the defendant's post-Miranda warnings silence in Greenfield was introduced during the State's case in chief, while evidence of Mr. Anderson's post-Miranda warnings silence was introduced during the State's case in rebuttal, after Mr. Anderson had presented his defense of insanity through lay and psychiatric expert witnesses. (Petition at 13-15) However, that alleged "distinction" is a distinction without a difference. In both Greenfield's and respondent's trials, the improper evidence of the defendants' post-Miranda warnings silence was admitted as substantive evidence of their sanity and thus of their guilt since the defendant's mental condition at the time of the offense was the guilt-or-innocence issue in each case. As the Eleventh Circuit Court of Appeals noted in Greenfield v. Wainwright, 741 F.2d 329, 336 (11th Cir. 1984), "unlike in Doyle, [defendant] did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried." See id. at 332 n.5; Doyle v. Ohio, 426 U.S. at 628.

Petitioner's further argument in this regard that a defendant should not be allowed to "fabricate" an insanity defense or present a "fraudulent" claim of insanity and then hide behind the Fifth Amendment was similarly already answered specifically by the Eleventh Circuit in Greenfield and implicitly by this Courtin Greenfield. See 88 L. Ed. 2d at 630 & n.8. The Eleventh Circuit's observation applies equally to the facts of the respondent's case: "This case cannot fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest

directly in issue in the opinions they expressed." 741 F.2d at 336. Moreover, as respondent explained above in the Statement of the Case, there was utterly no evidence or even suggestion at respondent's trials that he was feigning insanity or malingering or presenting a fraudulent defense. Instead, all psychiatric experts for the State and the defense agreed that respondent was afflicted with some form or degree of mental illness involving paranoia at the time of the shootings. Consequently, there is simply no distinction between the improper admission as substantive evidence of the defendant's sanity and thus of his guilt of his post-Miranda warnings silence in the State's case in chief in Greenfield and its admission as substantive evidence of Clifford Anderson's sanity and thus of his guilt in the State's case in rebuttal in the instant cause.

In summary, the Illinois Supreme Court properly applied the holding of Greenfield to the instant cause, which is factually on all fours with Greenfield. Since petitioner has provided no reason why Greenfield should be relitigated and thus why certiorari should be granted, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT ADMISSION OF CLIFFORD ANDERSON'S POST-MIRANDA WARNINGS SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT AND PROSECUTORIAL ARGUMENT THEREON WAS NOT HARMLESS ERROR. INDEED, UNDER ANY HARMLESS ERROR STANDARD, SUCH ERROR WAS NOT HARMLESS.

Petitioner requests this Court to grant certiorari to review the purely factual question, which was thoroughly and properly addressed by the Supreme Court of Illinois, as to whether the admission of respondent's post-Miranda warnings silence on two separate occasions as substantive evidence of his sanity and thus of his guilt, along with two improper admonishments by the trial court to the jury regarding that evidence which served only to highlight the impropriety as well as improper prosecutorial comments on that evidence in both the State's opening and rebuttal closing arguments, constituted harmless error. Petitioner also suggests that this Court, in reviewing that question, apply a more relaxed harmless error standard, from petitioner's viewpoint, which petitioner never asked the Supreme Court of Illinois to apply. (Petitioner at 22-23) Since the harmless error question in respondent's case is of no general importance, since the Illinois Supreme Court properly and thoroughly analyzed and determined the question of harmless error, since petitioner has lost any right to request that a different, more relaxed standard be applied, and since the constitutional error in respondent's case could not be harmless under any suggested standard, no ground has been presented which warrants a grant of certiorari in respondent's case.

Petitioner argues first that this Court should review the state supreme court's determination that the Doyle - Greenfield violation was not harmless error "given the sharp disagreement of the expert witnesses on the question" of respondent's sanity. People v. Anderson, 113 Ill. 2d 1, 7 (1986). According to petitioner, the state supreme court "ignored considerable lay evidence" of respondent's sanity, which petitioner purportedly then sets forth in its argument. (Petition at 18-20) It is noteworthy that petitioner has therefore conceded the closely balanced nature of the psychiatric expert

testimony, which, as respondent set forth above in the Statement of the Case, differed only as to the degree of respondent's paranoid mental illness. Equally closely balanced was the lay evidence of respondent's insanity. Two witnesses -- one a State's witness, the other a defense witness -- presented lay opinions that Clifford Anderson's conduct and state of mind at the time of the shooting were abnormal (R. 1425, 1582), whereas a police officer was the sole witness who testified that Mr. Anderson appeared to be normal. (R. 1464-65) Mr. Anderson's roommate described his paranoid delusions over the course of several months about the building in which he lived and worked and his "crazy" state of mind just before the shootings. (R. 1572-82) Mr. Anderson's sister testified to a history a severe mental illness in the Anderson family. (R. 1601-16)

In light of the extensive lay and expert opinion establishing Mr. Anderson's insanity at the time of the shootings, the evidence at worst was closely balanced. Since there is no question of the existence of a reasonable possibility that the improper admission of respondent's post-Miranda warnings silence on two separate occasions as substantive evidence of his sanity and his guilt, along with improper admonitions to the jury by the trial court over defense objection highlighting that impropriety (R. 1758-61, 1844) and emphasized by improper comments by the prosecutors on that evidence in both their initial and rebuttal closing arguments (R. 1878-79, 1952), may have contributed to Clifford Anderson's convictions, (see Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)), the Illinois Supreme Court correctly decided this factual question that the error was not harmless, and petitioner thus has presented no reason for this Court to review that determination.

Petitioner also claims that the error was harmless because it supposedly only affected a prong of the Illinois statutory insanity defense on which respondent allegedly did not rely. (Petition at 20-21) However, the Illinois Supreme Court properly answered that argument in its decision below:

> The prosecution explicitly told the jury that the evidence established the defendant's sanity under both prongs of the insanity defense, and this argument was consistent with the judge's admonitions. The State cannot now maintain that the jury ignored the advice and disregarded the evidence. 113 Ill. 2d at 6.

In any event, such a purely factual question revolving around Illinois' statutory definition of insanity (see Ill. Rev. Stat. (1981), ch. 38, sec. 6-2(a)) is not an issue of general importance meriting this Court's attention.

Finally, petitioner suggests that the less stringent harmless error standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974), should be applied to violations of Greenfield. (Petition at 22-23) The Illinois Supreme Court has applied the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), to violations of Doyle v. Ohio and thus implicitly applied the Chapman standard in the instant cause. See, e.g., People v. Miller, 96 Ill. 2d 385, 395-96, 450 N.E.2d 322 (1983). Indeed, the Chapman standard was not only the harmless error standard under which Mr. Anderson analyzed the question in his appellate brief in the state supreme court (Defendant's Brief at 84-87) but the Chapman standard was also the harmless error standard which petitioner in its appellate brief urged the Illinois Supreme Court to apply to the Greenfield issue. (State's Brief at 65-68) Petitioner thus has lost any right to request that a different, less stringent standard now be applied by this Court to the Greenfield violation in this case. See Steagald v. United States, 451 U.S. 204, 211 (1981). For that reason also, this Court should deny certiorari.

In any event, no matter what harmless error standard is applied to the Greenfield violation in respondent's case, that constitutional error was not harmless. Where the evidence of respondent's sanity was so closely balanced, it can clearly be concluded that, absent the improperly admitted evidence and admonitions by the trial court and arguments by the prosecutors on that evidence, the result of Mr. Anderson's trial would have been different, for he would have been

found not guilty by reason of insanity. Indeed, the fact that his first trial, at which the same Greenfield errors occurred, resulted in a hung jury is further evidence that the result of a fundamentally fair trial will be different.

Accordingly, in light of all the foregoing reasons, there is no basis for this Court to review this case. Respondent respectfully requests that the petition for certiorari be denied.

III.

SINCE GREENFIELD WAS SIMPLY AN APPLICATION OF THE WELL-SETTLED PRINCIPLES OF DOYLE V. OHIO, AND SINCE RESPONDENT'S CASE WAS NOT FINAL AT THE TIME OF THE GREENFIELD DECISION, GREENFIELD CLEARLY APPLIED TO RESPONDENT'S CASE AND THERE IS THUS NO REASON FOR THIS COURT TO REVIEW THE DECISION BELOW.

Petitioner asks this Court to grant certiorari in this case in order to use it as a vehicle to hold that this Court's decision in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623, 106 S. Ct. 634 (1986), is not to be applied retroactively to cases pending on direct appeal in the state court system at the time of the Greenfield decision. However, since the rule of Greenfield was not a clear break with past precedents but instead simply an application of the well-settled principles of Doyle v. Ohio, 426 U.S. 610 (1976), Greenfield undoubtedly must be applied to cases pending on direct review in the state courts at the time of its decision. See Shea v. Louisiana, 470 U.S. 50 (1985); United States v. Johnson, 457 U.S. 537 (1982). Since respondent's case was pending on direct review in the Supreme Court of Illinois at the time of the Greenfield decision, petitioner has presented no reason for this Court to grant certiorari in this case.

Contrary to petitioner's claim that Greenfield was "a clear break with prior precedent" (Petition at 24), Greenfield set forth no new substantive or procedural rule but simply reaffirmed the rule announced in Doyle v. Ohio in 1976 and applied it to another factual situation. The Illinois Supreme court recognized that fact when, a month prior to its decision in the instant cause, it held in People v. Stack, 112 Ill. 2d 301, 493 N.E.2d 339 (1986), that Greenfield "merely fleshes out the Doyle rule" and applies settled precedent to a new fact situation in order to avoid a fundamentally unfair trial and thus is fully retroactive. 112 Ill. 2d at 307-09. In reaching that conclusion, the state supreme court cited this Court's reasoning in Greenfield itself:

> "'The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach

> that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.' (Emphasis added.) Wainwright v. Greenfield (1986), 474 U.S. ___, ___, 106 S. Ct. 634, 639, 88 L. Ed. 2d 623, 630-31." People v. Stack, 112 Ill. 2d at 307-08.

Since Greenfield, according to this Court's own reasoning, is merely an application and not an extension of Doyle, this Court's retroactivity analysis in United States v. Johnson is equally applicable here:

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. 457 U.S. at 549.

Since Greenfield has not altered the rule of Doyle in any material way, it has been a foregone conclusion that Greenfield's rule applies to earlier cases. At the very least, as the Illinois Supreme Court has held, Greenfield must be applied retroactively to all convictions not yet final at the time that decision was rendered. See Shea v. Louisiana; United States v. Johnson, 457 U.S. at 562; Linkletter v. Walker, 381 U.S. 618, 627 (1975).

In choosing to analyze its retroactivity issue under the three criteria set forth by this Court in Stovall v. Denno, 388 U.S. 293, 297 (1967), petitioner claims that each factor militates against retroactive application of Greenfield. (Petition at 24) Petitioner has ignored a severe problem with its argument under each factor. First, petitioner argues once again that the issue in this case is "the admissibility of evidence which was properly obtained" through an "absolute model" application of Miranda and that "defendant has never

contended otherwise." (Petition at 25-26) To the contrary, however, as explained more thoroughly above in respondent's Statement of the Case, much of that evidence was improperly obtained through a violation of respondent's rights under Edwards v. Arizona, 451 U.S. 477 (1981), and Miranda v. Arizona, 384 U.S. 436 (1966), when respondent was reinterrogated by an assistant state's attorney after he had previously requested counsel following the Miranda warnings but had not been provided with counsel. Because of the Illinois Supreme Court's disposition of the Greenfield issue and its grant of a new trial to respondent, the court determined that it need not address the Edwards issue, which was concerned with most of the same improperly admitted evidence and prosecutorial argument and which was the third issue in Mr. Anderson's brief in the Illinois Supreme Court. (Defendant's Brief at 87-93)

Secondly, petitioner claims that the trial court's ruling on the admissibility of respondent's post-Miranda warnings silence was properly based on two cases which petitioner claims were the "only apparent authority" at the time of respondent's trial. (Petition at 26-27) However, the authority in effect at the time of Mr. Anderson's trial was Doyle v. Ohio. Any lower court authority to the contrary was simply wrong, as Greenfield now makes apparent. "Unjustified 'reliance' is no bar to retroactivity." Solem v. Stumes, 465 U.S. 638, 646 (1984).

As to the final criterion, petitioner concedes that, "[i]n contrast to the many cases likely affected by retroactive application of Edwards v. Arizona . . ., there are probably less (sic) cases in which a defendant's conduct during recitation of the Miranda warnings has been used to rebut the defense of insanity." (Petition at 27) Since Edwards was applied retroactively by this Court to cases pending on direct review when Edwards was decided (Shea v. Louisiana, 470 U.S. 50 (1985)), so too then should Greenfield be applied retroactively at least to cases pending on direct review at the time of that decision, as respondent's case was. As to petitioner's concern about the retrial of Mr. Anderson after the passage of so many years (Petition

at 27-28), Mr. Anderson will nonetheless be receiving a new trial because of the other severe error committed at his second trial, as set forth more thoroughly above in respondent's Statement of the Case.

In summary, Greenfield neither addressed anything left open by Doyle, nor announced an unanticipated principle which constituted a clear break with the past, nor overruled a past precedent, nor disapproved a practice arguably sanctioned in prior cases, nor overturned a longstanding and widespread practice supported by a near-unanimous body of lower court authority. See United States v. Johnson, 457 U.S. at 551. Greenfield is therefore fully applicable to Clifford Anderson's case. Accordingly, petitioner has provided no reason for this Court to grant certiorari in this case.

CONCLUSION

For all the foregoing reasons, respondent Clifford Anderson respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES J. DOHERTY
Public Defender of Cook County
403 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-6350

Counsel for Respondent.

ROBERT P. ISAACSON*
KAREN A. POPEK
Assistant Public Defenders

Of Counsel.

*Counsel of Record